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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of the jurisdictional statement filed on October 5, 1979 ("Jurisdictional Statement") by appellant Central Hudson Gas & Electric Corporation ("Central Hudson") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on July 9, 1979, denying rehearing of a judgment entered May 1, 1979, which upheld the federal constitutionality of the Public Service Law of New York State as construed and applied by the Public Service Commission of the State of New York ("Commission") in its orders of December 5, 1973, February 25, 1977, and July 14, 1977 prohibiting electric utility companies subject to the Commission's jurisdiction from advertising the use of

electrical energy. These orders are companions of the orders challenged in *Consolidated Edison Co.* v. *Public Service Commission* (No. 79-134), 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979), probable jurisdiction noted October 1, 1979.* In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae.* Copies of the consents have been filed with the Clerk.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979), and is set forth in Appendix A to the Jurisdictional Statement at 1a-14a.** The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), and is set forth in Appendix B to the Jurisdictional Statement at 15a-21a. The opinion of Special Term, New York Supreme Court, Albany County is not reported, and is set forth in Appendix C of the Jurisdictional Statement at 22a-24a. The three opinions of the Public Service Commission are reported in 13 N.Y. P.S.C. 2072, 17 N.Y. P.S.C. 1-R, and 17 N.Y. P.S.C. 17-R, and are set forth in Appendices D-1, D-2, and D-3 respectively of the Jurisdictional Statement at 25a-67a.

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* A petition for a Writ of Certiorari Prior to Judgment to the United States Court of Appeals for the Second Circuit was filed in this Court by Long Island Lighting Company on October 15, 1979 in the case of *Long Island Lighting Co.* v. *Public Service Commission,* No. 77C 972 (E.D.N.Y. March 30, 1979), *appeal docketed,* No. 79-7375 (2d Cir. April 30, 1979); *pet'n for cert. filed,* October 15, 1979. Petitions have also been filed by other parties in that case which challenges the same orders in controversy in the case at bar and in *Consolidated Edison Co., supra.*

** All references to Appendices refer to the Appendix To Jurisdictional Statement filed by Central Hudson on October 5, 1979, No. 79-565.

Jurisdiction

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(2), the appeal drawing in question the validity of a statute of the State of New York as interpreted by the Court of Appeals of the State of New York, and the validity of an order of the Public Service Commission of the State of New York promulgated pursuant to such statute, on the ground of repugnancy to the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the decision below having been in favor of the validity of the statute as interpreted and in favor of the validity of the order.

Questions Presented

1. Whether the Public Service Law, as so construed by the Court of Appeals and as applied in this case by the Public Service Commission, and the Commission's orders banning advertising by electric utility companies informing the public of uses of electricity, facially or as applied to appellant, are in violation of the First Amendment, as made applicable to the States by the Fourteenth Amendment; and

2. Whether the Public Service Law, as so construed and applied, and the Public Service Commission's orders, facially or as applied, are in violation of the Equal Protection clause of the Fourteenth Amendment.

Statutes Involved

Section 4, subd. 1, Section 5, subd. 2, and Section 66, subds. 1, 2, 4 and 5 of the New York Public Service Law were held by the New York courts to authorize the promul-

gation of orders by the Commission prohibiting the promotion of the use of electricity through the use of advertising by all electric utilities. The Court of Appeals' interpretation of the Public Service Law of New York State has the force of law. The Court of Appeals has made such an interpretation in upholding the validity of the Commission's orders of December 5, 1973, February 25 and July 14, 1977. That interpretation is challenged facially and as applied.

The text of the provisions of the Public Service Law cited above are set forth in Appendix H of the Jurisdictional Statement at 80a-83a and the text of the Commission's three orders are set forth in Appendices D-1, D-2, D-3 at 25a-66a.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns a vital interest of EEI and its members—their freedom of speech to disseminate truthful and accurate information concerning the uses and availability of electric service.*

Statement

The salient features of the decisions below are described in the Statement of the Case provided in appellant's Jurisdictional Statement at page 4 to page 7. That discussion need not be repeated here.

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* The same orders in controversy in this case are challenged in *Long Island Lighting Co.* v. *Public Service Commission, supra,* p. 2n., and a Petition for a Writ of Certiorari has been filed. The issues in that case are of comparable national importance, and EEI believes that *certiorari* should be granted.

The constitutional questions raised by the order of the Public Service Commission and the Public Service Law of the State of New York, as applied, have far-reaching implications for all of the nation's investor-owned electric utilities, especially those engaged in the provision of service to retail customers. As questions of energy supply and distribution have moved to the forefront of national attention, the freedom of utilities to disseminate accurate information about the uses of the services they offer has gained in significance, both to the utilities and to the public who require electric service and other forms of energy. A total and absolute ban on the dissemination of such information, such as that imposed by the Commission, leaves the utilities with no alternative means of communication on the issue and the consumer with no alternative source for complete and accurate information.

In a period in which consumers must make difficult choices among alternative energy sources and difficult decisions concerning the expenditure of their limited resources, it is of the utmost importance that utilities be free to supply truthful information to assist in these decisions. Any complete prohibition imposed on electric utilities, and not on their competitors who supply other forms of energy, deprives the utilities of the ability to compete adequately with those suppliers and deprives the consumer of complete information on which to rely in his selection of energy sources.

The decision of the New York Court of Appeals appealed from should be reversed. No compelling government interest is served by a complete and total ban on dissemination of information concerning electric utilities' available services. In the absence of such government interest, the First and Fourteenth Amendments protect the freedom of speech of appellant and other electric utilities; and also

protect the right of the public to receive the proffered information. The discrimination between electric utilities and their competitors who are not covered by the Commission's ban is irrational and violates the Equal Protection clause of the Fourteenth Amendment. Accordingly, the Commission's order should be invalidated.

ARGUMENT

1. The Commission's total ban on truthful advertising designed to disseminate information concerning electric services violates the First Amendment.

The ban imposed by the Public Service Commission and upheld by the Court of Appeals of the State of New York is a purely content-based prohibition, not a regulation of "time, manner and place of communication," and is in violation of the First Amendment. All unsolicited communications informing the public of uses of electricity are banned under any circumstances, regardless of their character, quality, style or purpose. Absent some compelling justification, such as the likelihood that speech will incite "imminent lawless action," content-oriented restrictions may not stand. *Brandenburg* v. *Ohio*, 395 U.S. 444, 477 (1969); *see Hess* v. *Indiana*, 414 U.S. 105 (1973); *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968). As a clearly content-based prohibition, it is subject to an exacting standard of review. *See Elrod* v. *Burns*, 427 U.S. 347 (1976), *First National City Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978).

The fact that "commercial" rather than "political" speech is at issue here does not alter the importance of the First Amendment principles involved. This Court, in a

developing line of cases, has recognized the constitutional protection afforded to so-called "commercial speech." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Carey* v. *Population Services, Inc.*, 431 U.S. 678 (1977); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977).

Although the Court has recognized "commonsense differences" between commercial and other varieties of speech, *Virginia Pharmacy*, 425 U.S. at 771, *Bates*, 433 U.S. at 381, none of the reservations which appear in other "commercial speech" cases applies to the case at hand. As stated above, this is a total ban on a particular content of speech, not a mere restriction by "time, place or manner." In *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978), this Court held that dissemination of commercial data in an unduly coercive manner cannot claim First Amendment protection. No finding that the utilities' advertising was unduly coercive was made here; rather, the Commission moved immediately to its absolute ban. Such a total ban on advertising cannot be sustained merely because some regulation of advertising is appropriate under *Ohralik*. *See Bates, supra*.

The Court of Appeals held that the Commission's total and all-inclusive ban on the dissemination of information was a "reasonable measure" to "prevent wasteful consumption or unneeded expansion of utility services." Appendix A at 5a. This Court has invalidated similar attempts by well-meaning public officials to influence behavior by controlling commercial speech.

In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), Mr. Justice Marshall writing for a unanimous Court rejected the notion that government may

regulate the flow of accurate information merely because it believes that such information might have "detrimental" social consequences. As Mr. Justice Marshall noted:

> "After *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.' " 431 U.S. at 92, n. 6.

In words particularly appropriate to the case at bar, Mr. Justice Marshall wrote:

> "The constitutional defect in this ordinance, however, is far more basic. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners self-interest and the corporate interest of the township. . . . As we said . . . in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading: 'There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . .' " [Quoting from *Virginia Pharmacy Bd., supra,* at 770.] 431 U.S. at 96-97.

In *Carey* v. *Population Services, Inc.,* 431 U.S. 678 (1977), this Court again refused to tolerate the suppression of accurate information as a permissible means of regulating public behavior by invalidating a prohibition on the

advertising of contraceptives in New York State. Likewise, in *Bigelow* v. *Virginia,* 421 U.S. 809 (1975), this Court upheld the legality of the dissemination of information to Virginians about the availability of abortions in New York (where they were legal) despite the illegality of abortions in Virginia.

These cases exemplify an increased concern with the right of the public to receive all available information relevant to the making of an informed choice among equally lawful courses of conduct. As explained by Mr. Justice Blackmun, writing for the Court in *Bates, supra:*

> "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decision making." 433 U.S. at 364.

In an area so basic to our national interest as the selection of energy sources, it is of the utmost importance that information be freely available. If the Commission seeks social control of the selection of energy sources, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring.) In *Long Island Lighting Company* v. *Public Service Commission, supra,* (unreported; set out in relevant part in Jurisdictional Statement, App. J at 88a-97a), a United States District Court case in which the same orders challenged here were held to be unconstitutional, Judge Pratt recognized the significance to the public of the "free flow of information on the use of electrical energy" both to

assist in "an individual's economic decisions" and so that the public may "utilize energy resources ecologically and efficiently." (Appendix J at 92a-93a).

By attempting to control the use of electricity through restrictions on speech, the Commission has prohibited the dissemination of information concerning innovative applications of electrical energy which might increase the use of electric energy, but could, at the same time, reduce the total consumption of fuels. If the Commission wishes to limit electric usage, it could publicize its concern or penalize the disfavored act without imposing an absolute ban on utility advertising. In adopting its ban, the Commission is attempting to control consumer behavior by a paternalistic manipulation of the flow of information rather than relying on the public's ability to decide among various options. The Commission's position implies that consumers are unable to judge for themselves whether to act responsibly in the area of electrical consumption. As Mr. Justice Blackmun wrote in *Bates, supra:*

> "the prohibition of advertising serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*" 433 U.S. at 374-75. (emphasis added).

No beneficial public purpose can be served by impeding the flow of information on energy sources within society. The public must have access to accurate data in order to

make informed choices. Electric utilities are in a position to provide such information, but, in New York, are prevented from doing so by the Commission's ban on advertising. Electric utilities must continually improve their knowledge of current and future sources of and uses for electrical energy. This knowledge can and should be made available to the public. Although an element of self-interest is, of course, present in any commercial advertising, this is not a ground for prohibiting the advertising.

> "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." *Eastern R.R. Presidents' Conference* v. *Noerr Motors Freight*, 365 U.S. 127, 139 (1961).

This statement applies equally as strongly to information on which individuals must rely in order to make decisions. That other sources of information concerning electric usage may be available in no way justifies the stifling of the electric utilities' right to be heard. Nor is the fact that the speaker is a regulated utility a justification for such limitations on First Amendment freedoms. In *Bellotti, Virginia Pharmacy, Carey,* and *Bates, supra,* the disseminators of the information were under extensive regulation, yet the ban on advertising in all these cases was invalidated.

Certainly, the conservation of energy is of national concern. However, the attempt by the Commission to achieve this goal through impairment of the free flow of information is in violation of the First Amendment and should be invalidated.

2. The order and the authorizing statute are unconstitutional under the Equal Protection Clause.

The promotional ban applies only to electric utilities. It does not apply to non-utility suppliers of energy, such as heating oil distributors. In view of the stated purpose of the Commission's order, which is to conserve oil supplies, this discrimination against electric utilities is irrational and violates the Equal Protection clause of the Fourteenth Amendment.

This Court has painstakingly evolved an equal access principle in the area of First Amendment rights which forbids the government from discriminating among speakers on the basis of content. *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Cox* v. *New Hampshire,* 312 U.S. 569 (1941). In *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), Mr. Justice Marshall wrote for a unanimous Court:

> "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . . Selective exclusions from a public forum may not be based on content alone. . . . Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression." 408 U.S. at 95-96.

In the case at hand, the Commission has not merely prevented access to a particular forum on the basis of content of speech, but has closed access to all forums to the electric utilities resulting in the grant of a virtual informational monopoly to the proponents of other energy sources. This grossly discriminatory scheme violates basic tenets of both Equal Protection and the First Amendment.

Moreover, the imposition of the ban only on electric utilities, among suppliers of energy, is irrational in that the stated purpose of the ban is to conserve oil. Electrical energy is produced from many sources other than oil,* and the Commission's ban, accepting its stated purpose, is far too broad. This Court has stated that, "[t]he Equal Protection Clause requires that statutes affecting First Amendment rights be narrowly tailored to their legitimate objectives." *Mosley, supra,* at 101. In the case at hand, even the Commission recognized that "a continued ban . . . may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion is not similarly proscribed." Jurisdictional Statement, Appendix D-2 at 37a. The Commission's order is not "narrowly tailored" to its objective. Rather, it allows many aspects of the oil consumption issue to be aired freely while imposing an absolute ban on the dissemination of information on one view—that of the utilities.

No rational, let alone compelling, state interest has been demonstrated by the government sufficient to justify such discrimination in restricting freedom of speech. Where fundamental freedoms are involved, a compelling state interest must be demonstrated. As Mr. Justice Powell wrote in *San Antonio Ind. School Dist.* v. *Rodriquez,* 411 U.S. 1 (1973), referring to the *Mosley* case:

> "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests.'" 411 U.S. at 34, n. 75.

The ban on the fundamental freedom of speech is discriminatory and irrational and no compelling state interest

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* Seemingly, the Commission's prohibition bars the promotion of the use of electricity derived from sources such as wind or water power, methods which assuredly conserve fuels.

has been demonstrated. The Public Service Law, as construed, and the Commission's order should be held invalid under the Equal Protection clause.

CONCLUSION

This Court should note probable jurisdiction in order to review the decision of the New York Court of Appeals sustaining the ban of the Commission on promotional advertising. That decision, with its far-reaching implications for the investor-owned utilities industry, presents substantial federal questions of public importance and should be reviewed as violative of the Equal Protection clause and the First Amendment rights of Central Hudson.

Respectfully submitted,

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